

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

September 23, 2008

Washington, DC 200

Dear

This letter responds to PDS' four administrative appeals to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code, 2001 Ed. §§ 2-351 *et seq.* ("DC-FOIA"), dated May 16, 2008 (the "Appeals") on behalf of [REDACTED] ("PDS"). We forwarded [REDACTED] Appeals to the Metropolitan Police Department ("MPD"), with a request for a response. MPD responded to the Appeals on May 30, 2008. The foregoing represents the appellate record, upon which we base this decision. Since [REDACTED] presents identical issues in each of the Appeals, we have consolidated these cases for the purpose of rendering the instant decision.

Background

In [REDACTED] original FOIA requests dated April 28, 2008, it sought a variety of documents concerning MPD police officers [REDACTED], [REDACTED], [REDACTED] and [REDACTED] including:

- (1) A list of all PD Forms 99, which are Citizen Complaint Reports, filed against or in reference to the above listed MPD members during their tenures of service with the MPD that were either received by, generated by, or are in the possession of the MPD including but not limited to those reports that are in the possession of the Office of Professional Responsibility at MPD;
- (2) A list of any and all reports made pursuant to MPD General Order 1202.5 against the above listed MPD members, as well as documents relating to those reports and subsequent investigations that were either received by, generated by, or in possession of the MPD including but not limited to those reports that are in the possession of the Office of Professional Responsibility at MPD.
- (3) A list of sustained complaints from the Office of Police Complaints and the Police Complaints Board, including recommendations of disciplinary action;
- (4) The dates of any disciplinary action taken by the Office of Police Complaints the Police Complaints Board and any and all documents related to these disciplinary actions;

- (5) Any entries made in the MPD Early Warning Tracking System involving the officers.
- (6) All documents relating to the MPD's Internal Affairs Division investigations of the officers.
- (7) A list of all PD Forms 150a and 150b and all PD Forms 901-e and 901-hc, for incidents in which the above listed MPD members were involved as well as all documents related to these forms and subsequent investigations;
- (8) A list of all PD Forms 150a and 150b, and all PD Forms 901-e and 901-hc, relating to the use of service weapons by members of MPD for incidents in which the above listed members were involved;
- (9) Any and all letters from the MPD to the listed MPD member giving notice that the MPD is beginning an investigation of the listed MPD member; and
- (10) All documents received by, generated by, or in the possession of the MPD relating to any other investigations or disciplinary actions relating to the above listed MPD members.

On May 15, 2008, MPD responded to [REDACTED] FOIA requests, stating that the Office of Police Complaints was a separate agency and that MPD does not generate or possess such records. MPD further added that MPD no longer uses Form 150 because this form has been replaced by forms 901-e and 901-hc. Finally, MPD alleged that the remaining records that PDS seeks are exempt from FOIA under D.C. Code § 2-534(a)(2) or D.C. Code § 2-534(a)(3)(C), arguing that the disclosure of such records would constitute an unwarranted invasion of personal privacy. MPD further argued that forms 901-e and 901-c are additionally exempt under D.C. Code § 2-534(a)(3)(A)(i) because they are law enforcement records used for investigatory purposes, which if produced, would interfere with enforcement proceedings. On May 16, 2008, PDS appealed MPD's decisions to our office, claiming that MPD improperly withheld complaints and disciplinary records. In its appeal, [REDACTED] argues that if the records are exempt under the privacy exemptions, that the public interest in such records far outweighs any privacy interests possessed by the officers. [REDACTED] did not reply to MPD's argument that the records constituted law enforcement records that should be excluded under D.C. Code § 2-534(a)(3)(A)(i). MPD responded to the Appeals on May 30, 2008, further advancing the same arguments presented in its original FOIA denials.

Discussion

This appeal presents three issues: (1) Is MPD required to provide records that it does not generate or maintain within the agency? (2) Are the records that [REDACTED] seeks access to investigatory records compiled for law enforcement purposes and exempt under FOIA because such disclosure would interfere with enforcement proceedings? and (3) Do the records that [REDACTED] seeks access to contain information of a personal nature, thereby making them exempt under FOIA because such disclosure would constitute a clearly unwarranted invasion of personal privacy?

District of Columbia Code § 2-531 states that "the public policy in the District of Columbia is that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." *See Id.* In furtherance of this policy, D.C. Code § 2-532(a)(2) provides that when searching for documents pursuant to a FOIA request, a public body should make "reasonable" efforts to search for the requested records. *See Id.* However, an agency is not required to produce records that they do not maintain in the ordinary course. Further, agencies are not obligated to create or search for documents not within their possession or control. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980).

1. *Is MPD Required to Provide Records That It Does Not Generate or Maintain Within the Agency?*

Before addressing whether MPD must provide the requested documents to [REDACTED], we must first determine whether MPD is even in possession of all of the documents sought. On appeal [REDACTED] alleges that MPD is improperly withholding records documenting complaints against MPD officers. However, according to MPD's May 15, 2008 response to [REDACTED] original FOIA request, the agency does not maintain Criminal Complaint Reports because these records are maintained by the Office of Police Complaints. On this basis, we find that MPD is not required to produce these documents to [REDACTED] and as MPD has suggested, [REDACTED] should instead request these records from the Office of Police Complaints. See *Kissinger* at 152. PDS further requests copies of PD 150(a) and 150(b), which MPD asserts the agency no longer uses. We find, therefore, that MPD is not required to provide 150(a)'s or 150(b)'s or any information contained therein to [REDACTED] because these forms no longer exist. See *Id.*

2. *Are the Records That [REDACTED] Seeks Access to Investigatory Records Compiled for Law Enforcement Purposes and Exempt From FOIA Because Such Disclosure Would Interfere With Enforcement Proceedings?*

District of Columbia Code § 2-534(a)(3)(A)(i) provides that records compiled for law enforcement purposes are exempt from disclosure under DC FOIA to extent the that such disclosure would interfere with enforcement proceedings. In interpreting D.C. Code § 2-534(a)(3)(A)(i), the court in *Barry v. Washington Post*, 529 A.2d 319 (D.C. 1987) stated:

Given the broad policy of disclosure underlying both the federal and District of Columbia statutes, we think it appropriate to adopt this interpretation for the District of Columbia FOIA as well. We therefore hold that the phrase "investigatory records compiled for law enforcement purposes" in exemption 3 refers only to records prepared or assembled in the course of "investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified [persons], acts which could, if proved, result in civil or criminal sanctions."

Id. at 321-322.

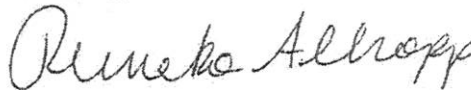
[REDACTED] seeks access to Form PD 150(b), previously used by MPD to document information regarding an officer's use of force. However, form PD 150(b) was replaced with forms 901-e and 901-hc. Due to the fact that forms 901-e and 901-hc are prepared as part of an investigation anytime an MPD officer uses force, the information contained therein may also contain information regarding alleged illegal acts or illegal acts of MPD officers. Such allegations could, if proved, form the basis of civil or criminal sanctions. Therefore, we find that forms 901-e and 901-hc are exempt from disclosure under D.C. Code §2-534(a)(3)(A)(i). The remaining records requested by [REDACTED] contain information regarding police misconduct, complaints or disciplinary issues. We find that these records may also contain information regarding investigations of alleged illegal acts or illegal acts of the above referenced officers and that, if proved, could result in civil or criminal sanctions. Therefore, the remaining records are also exempted from disclosure under D.C. Code §2-534(a)(3)(A)(i).

MPD asserts that the production of the requested records also constitutes an unwarranted invasion of privacy, in violation of D.C. Code §2-534(a)(2) and D.C. Code §2-534(a)(3)(C). However, we find it unnecessary to address this issue, given that we have already found that the requested records are excluded under D.C. Code §2-534(a)(3)(A)(i).

Therefore, we uphold MPD's decision to withhold all of the documents that [REDACTED] has requested. This appeal is hereby DISMISSED.

If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government at any time in the District of Columbia Superior Court.

Sincerely,

A handwritten signature in cursive script that reads "Runako Allsopp".

Runako Allsopp
Deputy General Counsel
Executive Office of the Mayor

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